IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 28 OF 2001.

1. Francisco Barreto,
   s/o Allen Barreto,
2. Estefania Barreto,
3. Allen Barreto,
   all residing near
   St. Sebastiao's Chapel,
   Loutolim, Goa. ... Appellants.

Versus

1. Judith Araujo Magalhaes
2. Mouzinho da Silva Soares
   both r/o Abade Faria
   Road, Margao. ... Respondents.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. S. Karpe, advocate for the Appellants.

Mr. M.B. D'Costa, Advocate for the Respondents.

Coram: P.V. HARDAS, J.

Date: 7th February 2002.

ORAL ORDER.

The unsuccessful defendants, by filing the present Second Appeal, seek to challenge the finding of fact recorded against the defendants by the two Courts below. The respondents/plaintiffs had filed Regular Civil Suit No. 337/88/C before the Civil Judge, Junior Division, Margao. The Civil Judge, Junior Division, Margao, by Judgment and Decree dated 20th December 1999 partly decreed the suit of the original plaintiffs in terms of prayers (a) and (b.b). The learned Civil Judge, Junior Division, also restrained the defendants from making any alteration or doing any act of damage or waste to or in the suit property including the suit house and permanently restrained them from alienating,

encumbering, creating any third party interest or parting with the possession of the suit property.

2. As per the copy of the plaint which is annexed to this Second Appeal, prayer clauses (a) and (b.b) read as under:-

> "(a) That the defendants, their family members, agents, servants and/or labourers be permanently restrained from interfering with and/or making any alteration and/or doing anything or any act of damage or waste to or in the suit property including the suit house in any manner whatsoever.
>
> (b.b) To grant a permanent injunction restraining the defendants from alienating, encumbering, creating any third party interest or parting with possession of the suit property."

These were the reliefs that were granted by the learned trial Court while partly decreeing the suit filed by the respondents/plaintiffs. The appellants/original defendants being aggrieved by the Judgment and Decree passed by the learned trial Court filed Regular Civil Appeal No. 18 of 2000 before the District Judge, South Goa, Margao. The learned Additional District Judge, South Goa, Margao by Judgment and Decree dated 16th March 2001 dismissed the appeal filed by the appellants/defendants, confirming the finding of fact recorded by the learned trial Court.

3. The learned trial Court had held that since the evidence on record pointed out that the suit property as per the matriz certificate was inscribed in the name of Honorinha and since Honorinha was the aunt of plaintiff no. 1 and as the plaintiffs were the legal representatives of Bossuet, who was the brother of Honorinha, the plaintiffs were the co-owners of the suit property alongwith Honorinha. The learned trial Court also accepted the case of the plaintiffs that the defendants had been brought in the suit house by the said Honorinha to give her company and to help her in carrying on the domestic duties. The learned trial Judge further held that though Honorinha had bequeathed the suit property in favour of the defendant no. 3 by will dated 3rd August 1982 and had died in 1987, the defendant no. 3 had a right to the suit property only to the extent of the share of Honorinha. The learned trial Court further held that the defendants 1 and 2 had no right to the suit property and the house and the plaintiffs and the defendant no. 3 were the co-owners. On these findings the learned trial Court had partly decreed the suit of the plaintiffs to the extent referred to above in the Judgment.

4. The learned appellate Court while deciding the appeal framed the following points for determination:-

> "a. Whether the plaintiffs/respondents are co-owners of the suit property?
>
> b. Whether the defendants/appellants have proved that Honorinha Araujo Magalhaes was the exclusive owner-in-possession of the suit property, if not otherwise, by way of prescription?"

In respect of the point for determination at (a) the learned appellate Court has answered that in the affirmative. In respect of the point for determination at (b) the learned appellate Court has answered it in the negative. The learned appellate Court found that there were no documents of title in respect of the suit property in the name of Honorinha. The plaintiffs had produced the Land Description Certificate Exhibit P.W.1/B Colly which showed that the owner prior to transmission to the actual possessor was one Joaquim Sebastiao Batista. The learned appellate Court also observed that it was an admitted fact that the property claimed by the defendants was the same bearing Land Registration No. 7443. The plaintiffs had produced Registration Certificate Exhibit P.W.1/B Colly which showed that 1/5th of 3/4th of the suit property was inscribed in favour of Public Prosecutor as that right was attached from Bossuet Araujo (father of plaintiff no. 1) towards the cost in Criminal proceedings. The said inscription in favour of the Public Prosecutor was subsequently cancelled, which would indicate that the

right to 1/5th of 3/4th reverted to Bossuet Araujo. The learned appellate Court has held that though this Land Inscription document was not a document of title, in the absence of any document of title produced by either party, the document at Exhibit P.W.1/B would have some value. The learned appellate Court at paragraph 7 has held that the Matriz Certificate clearly shows that the grandfather of plaintiff no. 1 was the owner of the suit property (Matriz No. 321) and house (Urban Matriz No. 67). The learned appellate Court after discussing the evidence of the parties has recorded a finding that the oral evidence on record read with the documentary evidence is sufficient by way of preponderance of probability to hold that Honorinha was not the exclusive owner of the suit property, but her brother Bossuet was also the co-owner.

5. Mr. Coelho Pereira, the learned senior counsel appearing for the appellants has urged the following two substantial questions of law:-

> "1. As to whether the First Appellate Court was right in deciding the suit, upon the points curled out for determination on the frame of the suit of the plaintiffs, and the reliefs sought for in the suit?
>
> 2. As to whether the learned Judge was right in holding, that the plaintiffs were owners of the suit house, to the extent of 1/5th of 3/4th, in the light of the unassailed findings of the trial Court on issue

> no. 6, and in the absence of any evidence adduced by the plaintiffs to establish their title to the suit property and upon misreading the evidence on record?"

6. It is urged before me that the two Courts below have not taken into consideration the material evidence of the parties. With the assistance of the learned counsel appearing for the appellants, I have perused the evidence which is annexed to this Second Appeal. The two Courts below have taken into consideration the evidence of the parties and after appreciating the evidence have recorded their findings. It is not necessary for the Judgment of the appellate Court to reproduce the entire evidence of the various witnesses examined by the parties. It is sufficient if perusal of the Judgment indicates that the trial Court has applied its mind independently to the evidence on record and has appreciated the evidence. Whether certain issues have been wrongly framed or whether certain issues ought to have been framed are not substantial questions of law which can be agitated in a Second Appeal. Therefore, according to me, the appellants are not correct in contending that certain evidence has been overlooked or not considered by the two Courts below.

7. In respect of the second question of law a reference may usefully be made to issue no. 6 as framed by the trial Court. The issue no. 6 reads as under:-

> "6. Whether the defendants prove that the suit house was constructed by Honorina about 60 years back and registered in her name? --- ...Affirmative."

The reasoning of the learned trial Court is to be found in paragraph 11 of its Judgment, which reads as under:-

> "11. ISSUE NO. 6:- PW1, i.e. plaintiff no. 2 and Honorina constructed house in suit property with material of demolished house. It is also admitted that said house is registered in the name of Honorina. DW1 also deposed that said house was constructed by Honorina and produced matriz certificate through PW1 at Exbt.PW1/D showing the suit house inscribed in the name of Honorina which is not disputed by plaintiffs. Plaintiff has also not disputed that Honorina constructed suit house 60 years back. Therefore, my answer to this issue is in affirmative."

8. It would be apparent that the learned trial Court has held that Honorinha has constructed the suit house with the material of the demolished house. The learned appellate Court after taking into consideration the evidence of the parties has held in paragraph 9:-

> "The construction of the house by Honorinha would only amount as an improvement in the suit property, becuase the old house bearing matriz no. 67, which belonged to the grandfather of the plaintiff no. 1 had collapsed."

Thus, on the basis of the evidence on record, the two

Courts below have held that Honorinha was not the exclusive owner of the property. The findings of the learned trial Court in respect of issue no. 6 do not go against the findings of fact arrived at by the two Courts below. The said issue cannot be read in isolation from the other issues and dehors the reasoning given by the learned trial Court.

9. The learned senior counsel appearing for the appellants has relied on the Judgment of the Apex Court in **Leela Soni and others v. Rajesh Goyal and others,** (2001) 7 S.C.C. 494 to contend that if the first appellate Court has not determined the relevant issues on account of an erroneous approach, the High Court would be within its jurisdiction in a Second Appeal in recording findings of fact on such issues, provided the evidence on record is sufficient. I have already held that the two Courts below have addressed themselves to the issues which were framed and the evidence on record and have correctly recorded the findings of fact, which cannot be termed as perverse. I see no perversity in the reasoning of the two Courts below to warrant disturbing the findings of fact recorded by the two Courts below.

10. Mr. D'Costa, the learned counsel appearing for the respondents, has referred to the Judgments in

Hari Singh v. Kanhaiya Lal, (1999) 7 S.C.C. 288 and **Ram Kumar Agarwal and another v. Thawar Das (Dead) through LRS.,** (1999) 7 S.C.C. 303 to urge that reappreciation of evidence is not permissible in Second Appeal and the High Court would not be justified in upsetting the findings of fact recorded by the two Courts below, if it involves reappreciation of evidence.

11. The present Second Appeal, according to me, does not involve any substantial question of law and the same is dismissed in limine with no order as to costs.

(P.V. HARDAS)
JUDGE.

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